Supreme Court, U.S.
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No. 04-373

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF OF TEXAS, DELAWARE, THE DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, MICHIGAN, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. Neither *Edwards* Nor the Fifth Amendment Are Implicated When a Suspect Voluntarily Reinitiates Contact with Police Officers.	3
II. The Policy-Based Reasoning of *Edwards* and *Miranda* Does Not Support the Lower Court's Overly Technical Holding That Blake's Initiation Was Part of a Continuous Course of Police Misconduct.	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	**Page**
Arizona v. Mauro, 481 U.S. 520 (1987)	4
Arizona v. Roberson, 486 U.S. 675 (1988)	4
Blake v. State, 849 A.2d 410 (Md. 2004)	5,7
Edwards v. Arizona, 451 U.S. 477 (1981)	*passim*
Frazier v. Cupp, 394 U.S. 731 (1969)	7
Henderson v. Singletary, 968 F.2d 1070 (11th Cir. 1992)	8
Holman v. Kemna, 212 F.3d 413 (8th Cir. 2000)	8
Michigan v. Tucker, 417 U.S. 433 (1974)	7
Miranda v. Arizona, 384 U.S. 436 (1966)	*passim*
Missouri v. Seibert, 124 S. Ct. 2601(2004)	6,7
Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988)	8
Oregon v. Bradshaw, 462 U.S. 1039 (1983)	3-4,6,9
Oregon v. Elstad, 470 U.S. 298 (1985)	*passim*
Rhode Island v. Innis, 446 U.S. 291 (1980)	4
United States v. Velasquez, 885 F.2d 1076 (3d Cir. 1989)	9
Constitutions	
U. S. Const., amend. V	*passim*

INTEREST OF *AMICI CURIAE*

Amici States have a substantial interest in ensuring the validity of convictions and sentences lawfully obtained through competent and non-coercive police investigation tactics. States also have an interest in providing clear guidance to state law enforcement officials for conducting such investigations. A prophylactic rule such as *Edwards v. Arizona*[1] cannot reasonably turn on unanticipated acts or statements without regard to good faith attempts to honor an invocation of counsel and to correct any missteps by investigators. If the Maryland court's interpretation of *Edwards* is allowed to stand, then the policy interests embodied in *Edwards, i.e.,* deterring police coercion and the taking of unreliable confessions, would be sacrificed for rigid but meaningless standards that benefit savvy criminals but denigrate curative efforts by conscientious officers attempting to scrupulously honor the law in complicated circumstances. Given the significant number of variables involved in even the most routine of criminal arrests, investigations, and prosecutions, arbitrary enforcement of such rules does more harm to the public than good because it may set otherwise guilty criminals free while failing to protect the very interests it was designed to. Thus, the Attorney General of Texas, and the attorneys general of *amici* States, have a significant stake in this Court's resolution of the Question Presented.

SUMMARY OF THE ARGUMENT

Blake was arrested during the investigation of a brutal carjacking and homicide: After he was transported to police headquarters in Annapolis, Maryland, Blake invoked his right to counsel. Blake was immediately placed in a holding cell and no further questions were asked of him. Less than an hour later, Detective Johns stopped by Blake's cell, tendered a copy of the charging documents, and instructed him to read them carefully. As Detective Johns was leaving, Officer Reese, a uniformed patrol officer uninvolved with the investigation, said "I bet you want to talk now, huh." A surprised Detective Johns stated loudly, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Detective

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[1] 451 U.S. 477 (1981).

Johns then escorted Officer Reese out of the area.

Approximately thirty minutes later, Detective Johns returned to provide Blake with clothing. As Detective Johns was about to leave, Blake asked, "I can still talk with you?" Detective Johns clarified that Blake wanted to talk to detectives, then returned Blake to the interview where he was read his rights and agreed to provide a statement without an attorney.

The record makes it clear that Blake reinitiated contact with police after first invoking his right to counsel, evincing a willingness and a desire to speak with Detective Johns. Thus, the Fifth Amendment rule of *Edwards* was not implicated and Blake's confession was admissible. The lower court erred when it ignored the curative measures taken by Detective Johns and treated the entire sequence of events as a single episode of police questioning. This Court's jurisprudence in the context of *Miranda v. Arizona*[2] makes it clear that, in the absence of deliberately coercive police investigation tactics, a court should not disregard good faith efforts by officers to honor a suspect's invocation of the right to counsel.

Consequently, the Attorney General of Texas, and the attorneys general of *amici* States, respectfully suggest that the lower court's interpretation of *Edwards* was in error and should be overturned. Further, *amici* States believe that this Court should resolve this novel dilemma — that is all but certain to recur — in favor of the State of Maryland.

ARGUMENT

In *Edwards v. Arizona*, this Court created a "bright line" rule concerning the Fifth Amendment right to counsel in order to "lend [] substance" to its holding in *Miranda*:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if

[2] 384 U.S. 436 (1966).

> he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, *unless the accused himself reinitiates further communication, exchanges, or conversations with the police.*

451 U.S. 477, 484-85 (1981) (footnote omitted, emphasis added).

I. Neither *Edwards* Nor the Fifth Amendment Are Implicated When a Suspect Voluntarily Reinitiates Contact with Police Officers.

The facts of *Edwards* illustrate the rationale behind its rule. The same day Edwards was arrested, he was informed of his *Miranda* rights and questioned about his involvement in a murder. 451 U.S. at 478. Edwards initially submitted to interrogation, but questioning was ceased when he requested counsel. *Id.* at 479. Early the next morning, Edwards was told that detectives wished to speak with him again. *Id.* Edwards replied that he did not want to talk, but was told that he was required to submit to further questioning. *Id.* Although Edwards was once again given *Miranda* warnings, he proceeded to implicate himself in the murder. *Id.* The Court noted that "had Edwards initiated the meeting," the Fifth Amendment would not render his confession inadmissible. *Id.* at 485. However, because Edwards was subjected to further custodial interrogation *against his will*, his incriminating statement was excluded. *Id.* at 487. Thus, much as with *Miranda*, the focus of *Edwards* was on the overbearing and intimidating tactics of state actors in continuing to interrogate Edwards, despite his unequivocal invocation of his right to counsel and the implied desire to communicate with police through counsel *only*.

A proper initiation obviates the Fifth Amendment concerns of *Edwards*, *i.e.*, that a subsequent waiver of the right to counsel was the result of overwhelming or undue influence by law enforcement officials. In *Oregon v. Bradshaw*, a plurality of the Court explained that the *Edwards* rule "was in effect a prophylactic rule, designed to protect an accused in police custody from being *badgered* by police officers in the

manner in which the defendant in *Edwards* was."[3] 462 U.S. 1039, 1044 (1983) (emphasis added). In *Bradshaw*, the defendant initially invoked his right to counsel, but then "evinced a willingness and a desire for a generalized discussion about the investigation" by asking, "Well, what is going to happen to me now?" *Id.* at 1042-43, 1045-46. As a result, a subsequent polygraph examination and confession did not amount to a violation of the *Edwards* rule because the suspect freely reinitiated contact with law enforcement. *Id.* at 1042, 1046. Hence, it is without question that the Fifth Amendment is not implicated and a confession is admissible, even when the right to counsel was previously invoked, when a suspect reinitiates contact with law enforcement and subsequently waives his right to counsel.

Here, it is plain that Blake voluntarily reinitiated contact with police after invoking his right to counsel when he queried Detective Johns, "I can still talk to you?" In fact, Blake had every reason to do so: he stood accused of a serious crime and he felt angry and betrayed by his co-defendant's accusation that Blake was primarily responsible. There is no doubt under *Bradshaw* that Blake's remark "evinced a willingness and a desire" to speak with Detective Johns, in order to clarify his relative culpability in the crime, and no Fifth Amendment violation occurred thereby. However, the novel issue before the Court — novel in the *Edwards* context — is whether Officer Reese's earlier, aborted attempt to speak to Blake tainted his subsequent *Bradshaw* initiation.

The Maryland court certainly believed so. In fact, the lower court determined that Officer Reese's statement was the beginning of

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[3] Similarly, in *Arizona v. Mauro*, this Court held that inculpatory statements made by a suspect to his wife in the presence of a police officer did not violate *Edwards* even though the suspect had previously invoked his right to counsel. *Mauro*, 481 U.S. 520, 522-23, 530 (1987). In so holding, the Court noted that Mauro's incriminating statements were not elicited by police conduct but by his wife. *Id.* at 527. Moreover, the statements were not the result of a ruse or psychological ploy perpetrated to "subjugate the individual to the will of his examiner." *Id.* at 526-29 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980), and *Miranda*, 384 U.S. at 457). Therefore, the Fifth Amendment was not implicated because the statements were not the result of a police-dominated, coercive environment. *Id.* at 529-30. The policy underlying the *Edwards* rule is simply not applicable where a defendant is able to act voluntarily and is not subject to the "inherently compelling pressures" of investigative interrogation. *Arizona v. Roberson*, 486 U.S. 675, 681 (1988).

"one continuous course of conduct" designed to overbear Blake's will and coerce a confession from him. *Blake v. State*, 849 A.2d 410, 416 (Md. 2004). Thus, Blake's initiation was not a initiation at all but merely a "direct response" to Officer's Reese's earlier question, "I bet you want to talk now, huh," because "[t]here was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect" of Reese's statement. *Id.* at 422. Apparently, neither a twenty-eight minute break between Officer's Reese's comment and Blake's question, nor Detective John's efforts to remedy the situation by instructing Reese that Blake had invoked his right to counsel and removing him from the area achieved adequate attenuation. *Id.* Yet, as shown *infra*, the lower court's reasoning is at odds with this Court's established Fifth Amendment jurisprudence and should be reversed. This is because *Edwards*, like *Miranda*, seeks to deter improper police conduct and assure trustworthy evidence, not hold law enforcement to an unrealistic standard of perfection. The state court's decision does not serve the policy goals of *Edwards*.

II. The Policy-Based Reasoning of *Edwards* and *Miranda* Does Not Support the Lower Court's Overly Technical Holding That Blake's Initiation Was Part of a Continuous Course of Police Misconduct.

In the *Miranda* context, this Court's clear focus on discouraging coercive tactics is illustrated in *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, police executed an arrest warrant at the home of a burglary suspect. *Id.* at 300. While the arresting officer detained the suspect momentarily so another officer could explain to the suspect's mother what was happening, the suspect admitted involvement in the burglary. *Id.* at 301. The suspect was promptly transported to headquarters and advised of his *Miranda* rights, which he waived, and then gave a formal confession. *Id* The issue before the Court was whether the initial failure to administer *Miranda* warnings so tainted the subsequent confession to render it inadmissible as well. *Id.* at 300. Ultimately, the Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318.

The Court first noted that neither *Miranda* nor the Fifth Amendment were concerned with "moral and psychological pressures

to confess emanating from sources other than official coercion." *Elstad,* 470 U.S. at 304-05. Rather, they advanced the goals of deterring improper police conduct and ensuring trustworthy evidence. *Id.* at 308. Thus, it was not within the scope of *Miranda* to hold that a failure to administer warnings — unaccompanied by any actual coercion or circumstances purposefully calculated to undermine free will — taints the investigatory process so that a subsequent waiver and confession would be inadmissible. *Id.* at 309, 313. To do so would severely handicap legitimate law enforcement activity but would do little to protect the individual's constitutional right against compelled testimony. *Id.* at 312. The proper role of a court is to "examine the surrounding circumstances and the entire course of police conduct with respect to the suspect" with an eye for deliberate coercion. *Id.* at 318. Moreover, in so doing, courts should engage in more substantive inquiries than "who said what first." *Bradshaw,* 462 U.S. at 1050 (Powell, J., concurring). Clearly, both *Miranda* and *Edwards* were designed to effect the same end.

The instant case does not present a situation where Blake was forced to speak with law enforcement or to waive his right to counsel against his will, under police pressure. Indeed, Maryland law enforcement scrupulously honored Blake's *Miranda* and *Edwards* rights from the instant of his arrest. But for a single, unanticipated comment by an officer unconnected to the investigation, there was no attempt to undermine Blake's free will. In contrast, this Court recently considered a deliberate scheme to do just that by placing a suspect in a *Miranda* catch-22. In *Missouri v. Seibert,* the defendant was subjected to a two-step protocol, *i.e.,* the suspect was purposefully given no *Miranda* warnings until she confessed, then was warned and asked to repeat her statement for the record. 124 S. Ct. 2601, 2605-06 (2004) (plurality opinion). This two-step process was deliberate: officers were trained to employ it. *Id.* at 2608-09. As the Court explained:

> the reason that [the two-step process] is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble.

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Id. at 2610-11. This is, without a doubt, a strategy to thwart *Miranda* and subvert the suspect's free will and, as a result, violates the Fifth Amendment. *Id.* at 2612-13.

The interplay of *Elstad* and *Seibert* illustrates the policy interests inherent in both *Miranda* and *Edwards*: the Fifth Amendment must not be compromised by clever police tricks, constant badgering, or a coercive atmosphere. Blake was subjected to none of these elements. There was no effort to induce a confession through unwholesome means. Blake was not harassed by detectives soliciting a waiver of his previous invocation of counsel.[4] Instead, detectives scrupulously honored that invocation save for a single, spontaneous comment by Officer Reese, which went unanswered. It cannot be credibly argued that Reese's conduct was planned or sanctioned by Detective Johns or any member of the investigating authority. It is surprising that the court below disregarded the honorable and nearly flawless police conduct in the instant case, focusing instead on Officer Reese's random statement, which was quickly corrected by Detective Johns. As this Court has noted, the law "cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan v. Tucker,* 417 U.S. 433, 446 (1974). Rather, the law should fully endorse and encourage curative efforts by officers attempting to correct a momentary mistake. The state court's conclusion is clearly at odds with *Edwards* and *Miranda* in this respect.

Other courts have taken a policy-based approach similar to

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[4] The lower court makes much of the fact that the charging documents provided to Blake incorrectly informed him that he was eligible for the death penalty. *Blake v. State,* 849 A.2d at 413-16, 420, 422. However, this Court has rejected the notion that such a falsehood — even a deliberate lie to a suspect — is impermissibly coercive. *Frazier v. Cupp,* 394 U.S. 731, 739 (1969). Additionally, this mistake can only reasonably be viewed as a minor psychological pressure amongst many. This Court has held that such factors are not controlling. *Elstad,* 470 U.S. at 304-05.

Elstad in this regard. For example, in *Holman v. Kemna,* sheriff's deputy Wright visited Holman after he had invoked the right to counsel, ostensibly to deliver information that his girlfriend had implicated him in a murder. 212 F.3d 413, 416 (8th Cir. 2000). The next day, Holman asked Wright to return and take his confession. *Id.* At issue, then, was whether the earlier visit — initiated by law enforcement — tainted Holman's subsequent statement. *Id.* at 417. The court of appeals found that, importantly, "when Wright left Holman's cell [the first] night, Holman had not made any statement, thus reducing the likelihood that he was under any compulsion to confess" the next day. *Id.* at 419. As a result, the court held that the policy of *Edwards* was not violated because there was no police overreaching. *Id.* at 419-20. The Eight Circuit's focus on the absence of coercion is in line with *Edwards* and clearly illustrates the error in the lower court's overly technical approach. Moreover, the facts of this case track *Holman* closely. Because Blake did not respond to Officer Reese's improper comment, and most likely heeded Detective Johns's subsequent effort to attenuate any taint, it is doubtful that Blake's later initiation was compelled in any way.

Similarly, in *Henderson v. Singletary,* the Eleventh Circuit held that, when addressing an *Edwards* initiation issue, a court should not employ an overly-technical analysis of elapsed time or a sequence of events, but "must instead satisfy themselves that the defendant-initiated confession was not the product of improper police questioning or pressure." 968 F.2d 1070, 1074 (11th Cir. 1992) (opinion on r'hrg). The particular amount of time between an improper communication and an initiation is less important than the opportunity for rational reflection on the choice before the suspect, to ensure the decision is not the result of police badgering and was not clouded by improper threats or promises. *Id.*; *see also Moore v. Dugger,* 856 F.2d 129, 133 (11th Cir. 1988) (holding that "[i]f a suspect clearly, of his own volition, changes his mind about wanting counsel, we see nothing ... to require that the withdrawn request for counsel continue in force"). In the instant case, despite the twenty-eight minute interval between Officer Reese's

comment and Blake's initiation,[5] it is doubtful that either Officer Reese's statement or any police conduct would have spurred any suspect's decision to speak with detectives. Instead, it is far more reasonable to acknowledge that Blake's desire to exculpate himself following his co-defendant's accusations motivated his actions. Thus, the court below was necessarily out of line with the intent of *Edwards* and *Elstad* when it found a Fifth Amendment violation in the absence of overt coercion.

The heart of *Miranda* and *Edwards* has always been deterring police misconduct and ensuring the voluntariness a suspect's confession. These are the ultimate concerns. Secondary to these policy interests is the desire for a bright-line rule. But such a rule must not be allowed to undercut these core policy concerns and render them mere words on paper. Indeed, the bright-line rule of *Edwards* is that interrogation must cease when a suspect asks for a lawyer. This is exactly what happened in the instant case. In fact, but for a rogue police officer's unanswered question, there is no evidence in the record that Blake did not voluntarily and willingly reinitiate contact with Detective Johns without coercion or undue influence of any kind. Overly technical analyses and murky, circumstantial reasoning such as that employed by the lower court bring more confusion to the *Edwards* arena. This Court should clarify and reaffirm that, absent coercive police tactics, an initiation of contact by a suspect is valid under *Edwards* and *Bradshaw* as long as that initiation demonstrates a willingness and a desire for further discussion with law enforcement authorities.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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[5] Even if a time-elapsed approach is taken, the Third Circuit has found that a thirty minute interval between an invocation and a reinitiation does not run afoul of *Edwards*. *United States v. Velasquez,* 885 F.2d 1076, 1085-86 (3d Cir. 1989).

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